Request for Proposals (the "RFP")[1] for management of telecommunications facilities at both Dulles and National. In response to the RFP, GTE and Bell Atlantic Virginia[2] teamed to propose a centrex-type solution, fully capable of achieving all of MWAA's telecommunications requirements. Initially, MWAA refused even to consider a centrex-type solution, but later agreed to permit the GTE/Bell Atlantic team to bid on that basis. Harris Corporation, however, was selected as MWAA's telecommunications manager.

From the inception of its telecommunications proposal, MWAA did not disguise its intention to oust GTE as the LEC. The RFP stated:

> Moreover, it shall also be the responsibility of the Contractor to purchase and operate all cable plant currently placed at Dulles Airport that is owned by General Telephone and Electronics Company (GTE) or develop an agreement with GTE such that the Developer shall have full unilateral control of all outside and inside cable plant at the facility.

RFP, Exhibit A, at 3. MWAA's motivation in attempting to oust GTE as the LEC was equally transparent; it desired to profit from the arrangement. In fact, MWAA reserved the right in the RFP to reject all proposals received in the event that none of them could provide its desired revenue stream. RFP at 2 ¶ 1.E. The RFP indicated that MWAA would be paid 40% of the operating profits of the Dulles telecommunications system over the life of the contract; clearly, if

---

[1] Metropolitan Washington Airports Authority Request for Proposals No. MWAA-R-3-93-02 for the Implementation, Management, and Operation of a Telecommunications Concession Service at Washington National and Washington Dulles Airports (March 19, 1993). It is not appended to this pleading due to excessive length.

[2] At that time, this Bell Atlantic operating subsidiary was the Chesapeake & Potomac Telephone Company of Virginia. Its title was changed to Bell Atlantic Virginia in 1994. The Bell Atlantic title is used throughout to avoid confusion.

MWAA could prevent GTE from providing competing service, its share of the revenue would be maximized. GTE's current revenue at its Dulles exchange exceeds $2,000,000 per year.

Following award of the Dulles contract to Harris, GTE and MWAA negotiated regarding the possible relocation of demarcation point(s) and the possible sale of GTE's existing plant to MWAA. In 1994, GTE and MWAA almost reached an agreement in principle for MWAA to acquire GTE's existing facilities, although price and terms of sale were never finalized. These negotiations failed because MWAA refused to move forward with the sale before the end of 1994, as repeatedly requested by GTE.[3/]

In early 1995, GTE approached the staff of the Virginia State Corporation Commission ("VSCC") to confirm its rights and responsibilities should the sale of its Dulles facilities to MWAA be consummated. The VSCC staff determined that, under Virginia law: (1) GTE's sale of its facilities to MWAA would not relieve GTE of its duty to serve as the local exchange carrier of last resort for customers located in the Dulles community; and (2) if GTE was unable to provide service through its own facilities, it could be subject to significant penalties if MWAA refused to cooperate to enable GTE to provide such service directly. As a result of this determination and considering MWAA's consistent lack of cooperation during a course of negotiation over a year in length, GTE determined that the risk associated with the sale of its facilities to MWAA exceeded that which the company was willing to undertake. Therefore, in late April, 1995, GTE informed MWAA that it was no longer willing to sell its plant to MWAA.

[3/] MWAA's reluctance to conclude the sale may have been due to development of its present strategy, which is to try to freeze GTE out of the Dulles local exchange market without any compensation.

Exactly coincident with this breakdown of negotiations, MWAA began a course of anti-competitive conduct which continues to this day. By way of background, during the past four years, MWAA had without a single exception issued every construction permit requested by GTE within two or three weeks of GTE's application. In fact, to GTE's knowledge, MWAA (or its predecessor, the FAA) had never denied GTE (or its predecessors Contel, Commonwealth, and Piedmont telephone companies) a requested permit. On April 26, 1995, GTE's Dulles field personnel applied for a permit to lay a 200-circuit cable in an underground cable conduit adjacent to the North Service Road (outside of the IAD controlled security perimeter) in order to provide telephone service requested by the Dulles Greenway toll road. After three weeks had passed and with the customer's service deadline approaching, GTE's field personnel, assuming that the permit had been or would soon be granted, began to lay the cable. During this construction, an MWAA field superintendent told GTE's field personnel that the permit had not yet been granted and ordered the construction stopped. GTE immediately stopped construction and waited for the permit to issue. MWAA continued to ignore GTE's application until, in response to GTE's specific request, MWAA indicated that the permit would not be granted and that GTE would need to run its cable outside of MWAA-leased land. See Letter from Keith W. Meurlin, IAD MWAA Airport Manager to Tony Williams, GTE Senior Engineer (June 9, 1995) (provided at Exhibit A). MWAA continues unreasonably to delay or alter without explanation GTE construction permit applications.[4/] On June 5, 1995, MWAA purported to impose a solution

[4/] GTE thereafter submitted a second permit application proposing a different route to provide the toll road service on June 1, 1995. MWAA denied this application on July 6, 1995.

GTE also applied on June 1, 1995 for a permit to serve a new customer on MWAA-leased

Footnote continued on next page

based on its negotiating position. The MWAA Request represents an attempt by MWAA to obtain Commission ratification of its attempt to impose a solution it was unable to achieve through negotiation.

II. MWAA'S INTERPRETATION OF THE COMMISSION'S DEMARCATION POINT DEFINITION IS INCORRECT.

Relying on paragraph (b)(2) of the Commission's definition of "demarcation point" at 47 C.F.R. § 68.3 (1995), MWAA argues that the owner of multiunit premises[5/] has unfettered discretion to dictate to the local exchange carrier the number and location of demarcation points.

Footnote continued from previous page

property, the Alamo rental car company, using the partially-completed North Service Road cable (already laid past Alamo's facility). After almost a six week delay, MWAA on July 10, 1995 granted a permit, but demanded that GTE remove the 200-circuit cable and substitute a 100-circuit cable. GTE complied with this unusual demand, which clearly bears no relationship to MWAA's legitimate public safety or security concerns but is totally consistent with MWAA's stated desire to limit GTE's direct access to customers on MWAA leased property. However, at present, demand for service exceeds the capacity of GTE's 100-circuit cable. MWAA has not yet replied to GTE's August 25, 1995 construction permit application to lay an additional, parallel 100-circuit cable in order to provide service requested by additional customers.

[5/] Despite its assertion to the contrary, see Letter from Ian D. Volner, Esq., Counsel for MWAA to A. Randall Vogelzang, Esq., GTE Telephone Operations 3 (June 5, 1995) (the "Volner Letter") (provided at Exhibit B to this Opposition and as Attachment 2-A to the MWAA Request), it is far from clear that MWAA is properly classified as the "premises owner" under FCC rules. First, it has only a leasehold interest, albeit long-term. Second, the commercial buildings at Dulles were erected using private funds and are owned by those private entities, which hold ground leases relating to the real estate upon which the building are constructed. In the absence of undisclosed lease terms to the contrary, MWAA's only vested property interest is that of a vested remainder following the expiration of the terms of those leases. MWAA's property rights relating to that vested remainder interest are limited to preventing waste. GTE's network facilities to these buildings certainly do not constitute waste in the usual sense of that term because they enhance, rather than diminish, the value of the remainder estate. Moreover, GTE's network facilities cannot constitute ameliorating waste, because they do not change the character of the use of the property.

MWAA's interpretation of the Commission's definition of demarcation point contained in 47 C.F.R. § 68.3 (1994) is incorrect both in theory and in application.

MWAA's argument as to its power to dictate the demarcation point depends upon a single sentence in the Commission's definition of demarcation point: "The multiunit premises owner shall determine whether there shall be a single demarcation point for all customers or separate such locations for each customer." 47 C.F.R. § 68.3 (1995) (definition of "demarcation point" ¶ (b)(2)); MWAA Request at 6. When this sentence is restored to its context, however, it is quite plain that the right of the premises owner to designate a demarcation point(s) is triggered only if the carrier does not establish a reasonable and nondiscriminatory practice to locate its demarcation point(s) at the minimum point of entry. The plain language of the regulation makes this clear.

Paragraph (b)(2) of the definition of demarcation point reads as follows[6]:

> In multiunit premises in which wiring is installed after August 13, 1990, including additions, modifications, and rearrangements of wiring existing prior to that date, the telephone company may establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. The multiunit premises owner shall determine whether

[6] Note the structure of the definition. It first states the basic rule (i.e., that the telephone company may place the demarcation point(s) at the minimum point of entry, subject only to the fully justifiable constraint that its practice be reasonable and non-discriminatory). It then states an exception to the basic rule (i.e., that the multipremises unit owner may determine the location and number of the demarcation point(s)), and the condition which causes the exception to become operative (i.e., failure of the telephone company to establish a reasonable and nondiscriminatory practice to locate the demarcation point(s) at the minimum point of entry).

there shall be a single demarcation point location for all customers or separate such locations for each customer.

47 C.F.R. § 68.3 (1994) (definition of "demarcation point" ¶ (b)(2)) (emphasis added).

The critical sentence on which MWAA's argument rests is found in the portion of the definition which states the exception, not that portion which states the basic rule. Thus, any right of MWAA to designate a demarcation point unequivocally arises only upon a failure of GTE to establish a reasonable and nondiscriminatory practice to place demarcation point(s) at the minimum point of entry. That the Commission, in stating the authority of a premises owner, did not choose to repeat the conditional language of the preceding sentence is of no moment, because the sentence upon which MWAA relies is quite clearly not an independent statement. Rather, it is a descriptive modifier of the previous sentence's conditional grant of discretion to the multiunit premises owner.[7/]

[7/] In attempting to bolster its assertion that the premises owner's right to designation is not conditional, MWAA states that "[t]he flexible structure of the rule 'limiting the discretion' of the carrier and affording the premises owner the ultimate ability 'to select the service configuration' for its campus or facility (In the matter of Section 68.104 and 68.213 of the Commission's Rules, 5 F.C.C. Rcd. 4686, 4693, 4707 fn. 29, 30 (1990) ('Demarcation Order') reflects the concerns that led the Commission to adopt section 68.3(b)(2)." MWAA Request at 6 (first emphasis added). However, this attempt to use fragments of the Commission's statement of considerations fails. The first "quotation" is nonexistent and the second is used badly out of context. The first "quotation" of the emphasized language above ("limiting the discretion") appears neither on any of the cited pages or any of the cited footnotes, nor, indeed, anywhere else in the Demarcation Order. The second quotation supposedly supporting MWAA's assertion was lifted from footnote 31 in the statement of considerations in the Demarcation Order. This footnote is obviously directed at disputes between a tenant and the multiunit premises owner, not disputes between the multiunit premises owner and the LEC. This footnote establishes, in the absence of lease language to the contrary, that the right to determine the service configuration of a multiunit property, as between owner and tenant, lies with the owner. Footnote 31 does not address demarcation point rights as between the multiunit premises owner and the LEC. Those rights are established in the rule itself and are extensively addressed in the body of the statement of considerations.

The condition precedent to an exercise of control by MWAA is clearly not invoked. GTE's practice is, and has always been, to place the Dulles demarcation point(s) at the minimum point of entry. The Commission defines minimum point of entry as follows:

> The "minimum point of entry" as used herein shall be either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. <u>The telephone company's reasonable and nondiscriminatory standard operating practices shall determine which shall apply</u>. <u>The telephone company is not precluded from establishing reasonable classifications of multiunit premises for purposes of determining which shall apply</u>. Multiunit premises include, but are not limited to, residential, commercial, shopping center and campus situations.

47 C.F.R. § 68.3 (1994) (definition of "demarcation point") (emphasis added).

The Commission thus vested the telephone company, in the first instance, with the right to determine whether the minimum point of entry would be at the entrance of buildings or at the border of the real estate. Since the inception of the inside wiring doctrine,[8] GTE's reasonable and nondiscriminatory practice has been to locate demarcation points at Dulles in full compliance with the Commission's definition of minimum point of entry. MWAA does not dispute the location of these demarcation points or otherwise suggest that any such point is not at the minimum point of entry as defined by the Commission. More generally, as GTE has repeatedly informed MWAA, in situations like that extant at IAD, it is the company's practice to locate demarcation points at individual buildings, just as the Commission's rule contemplates. <u>See, e.g.</u>,

[8] Prior to the FCC's adoption of the inside wiring orders, GTE (like AT&T and all other telephone companies) owned and controlled all wiring in the network, including wiring inside structures. Thus, prior to the adoption of those orders, the concept of a demarcation point between customer wiring and network wiring did not exist.

Letter from A. Randall Vogelzang, Esq., GTE Telephone Operations to Ian D. Volner, Esq., Counsel for MWAA 1 (June 13, 1995) (provided at Exhibit C to this Opposition and Attachment 2-C to the MWAA Request) and Letter from A. Randall Vogelzang, Esq., GTE Telephone Operations to Ian D. Volner, Esq., Counsel for MWAA (May 17, 1995) (the "GTE May 17 Letter) (provided at Exhibit D to this Opposition and Attachment 2-B to the MWAA Request). MWAA similarly does not dispute that this is GTE's reasonable and nondiscriminatory standard operating practice. It is reduced to offering the unsubstantiated assertion that "an argument could be made" that GTE is not pursuing such a practice. See MWAA Request at 7. Thus, GTE clearly has a reasonable and nondiscriminatory practice of designating the demarcation point at the minimum point of entry, which it has consistently followed at Dulles. Accordingly, under the plain language of paragraph (b)(2), this is the end of the matter: Given GTE's practice, the condition that might have given MWAA authority under the Rule to relocate the demarcation point to a place of its choice does not exist.

Apparently recognizing this fatal deficiency, MWAA seeks to suggest indirectly, although it does not actually assert, that the GTE May 17 Letter does not articulate a "policy" that is reasonable and nondiscriminatory. Even assuming arguendo that it is the writing provided to MWAA, and not GTE's actual practice, that is implicated by the Commission's rule, MWAA's argument still fails.

Specifically, MWAA assails the GTE May 17 Letter because it does not establish a monolithic, inflexible practice for establishing demarcation points, but instead provides a series of classifications, which MWAA labels "options." See MWAA Request at 7. The Commission rule, however, does not require telephone companies to establish a mindless, inflexible practice. To the contrary, the Commission's rule specifically states that "[t]he telephone company is not precluded from making reasonable classifications of multiunit premises for purposes of determining which [minimum point of entry criterion] shall apply." 47 C.F.R. § 68.3 (1995) (definition of "demarcation point"). Clearly, GTE has established such classifications. Even a cursory examination of the GTE May 17 Letter reveals it does not establish "options." Rather, it presents factual classifications which are determinative of the location of demarcation point(s):

1. A classification of single unit buildings (demarcation point at the protector of the building or house).
2. A classification of multiunit locations (demarcation point where the wiring enters the building(s) in one of several enumerated locations: basement, ground floor, etc., on the interior or exterior of the building within 12 inches of the network protector).
3. A special situation in which, for some reason, it is appropriate to place the demarcation point at the property boundary (e.g., an owner refuses to pay additional construction charges[9] or a campground with many individual sites).
4. A campus situation (demarcation points normally at individual buildings).
5. Other special situations such as recreational vehicles, public telephones, and hazardous conditions.

GTE May 17 Letter at 1-2.

[9] GTE tariffs, similar to those of all public utilities, are structured to prevent a single customer from requiring an excessive subsidy of construction costs relating to personal choices. For example, tariffs typically provide that GTE must bear the cost (which is added to the rate base) of extending the public switched network to a residence located within a reasonable distance (e.g., 250 feet) of its right-of-way. If the customer, however, elected to site the residence 600 feet inside the property line, the customer must reimburse GTE its cost to extend the public switched network the last 350 feet. If the owner were to refuse these costs (perhaps an independent contractor can perform the work at less expense), GTE would establish a demarcation point at the property line.

The above classifications are thus plainly not a series of "options" from which GTE can, with unfettered discretion, select the demarcation point. The GTE policy clearly makes reasonable classifications, and the normal location of the demarcation point(s) clearly follows from the classification. It is worth noting that, under GTE's classifications, a demarcation point at the entry point into buildings is the norm, with demarcation points at property boundaries an exception reserved for special circumstances. MWAA apparently demands a written policy which would be mechanically applied in every circumstance regardless of local conditions or cost. This result would be absurd. GTE serves millions of customers which have millions of variations of premises configurations. MWAA's suggestion that GTE's policy is unacceptable because it evidences some flexibility reflects a complete misapprehension of the realities facing a national telephone company. For this reason, the Commission's rule wisely authorizes telephone companies to establish different classifications for different needs and situations.

In a final effort to turn the Commission's rule on its head, MWAA asserts that it is unnecessary to examine whether GTE's demarcation practice satisfies the applicable regulations because MWAA's designated demarcation point at Building 8 "is consistent with GTE's policy as it has been described to us." <u>See</u> <u>MWAA Request</u> at 7 Of course, whether <u>MWAA's</u> designated demarcation point is consistent with <u>GTE's</u> nondiscriminatory practice is entirely beside the point. The only issue here is whether MWAA has any right unilaterally to relocate GTE's long-established demarcation points. Under Commission rules, resolution of that issue necessarily requires only a determination of whether GTE has established a reasonable and nondiscriminatory practice to locate demarcation points at the minimum point of entry. Under paragraph (b)(2), if the carrier establishes such a practice to locate demarcation points at the minimum point of entry, its determination is final. This is precisely what GTE has done at Dulles.[10/] In order to defeat GTE's determination, the rule requires MWAA to demonstrate that GTE's practice is either unreasonable or discriminatory. MWAA makes no attempt to present such a showing. Whether some other location which MWAA might prefer for its demarcation point might also appear to conform with MWAA's reasonable and nondiscriminatory practice is legally irrelevant. This is because the decision as to whether circumstances require an exception to GTE's usual practice of placing demarcation points at each building is a judgment committed by the Commission to GTE's discretion, not to MWAA's.

MWAA's purported reliance on special "security and public safety needs" is mere rhetoric, because (1) these needs do not somehow enable MWAA to adopt designation authority denied to it under FCC rules; (2) for more than 30 years, GTE and its predecessor have complied with reasonable security and public safety requirements at Dulles airport;[11/] and (3) MWAA has

[10/] For this reason, MWAA also cannot rely upon the Commission's language in the Demarcation Order to the effect that a premises owner can request a carrier to relocate its demarcation point in an existing installation to a minimum point of entry. See MWAA Request at 8-9 (quoting Demarcation Order, 5 F.C.C. Rcd. at 4707 n.27). The current location of the demarcation point(s) at Dulles is already at the minimum point of entry as defined in the Demarcation Order. The place at which MWAA wishes to relocate the demarcation point (inside Building 8), is not at a minimum point of entry because Building 8 is neither at the place where the wiring crosses a property line nor at the place were the wiring enters a building. Thus, the Demarcation Order language which MWAA cites from footnote 27 is inapplicable.

[11/] The single recent incident relating to the Dulles Greenway toll booth (see supra n.4 and accompanying text) which MWAA cites to the contrary resulted from an erroneous assumption by GTE's field personnel that MWAA would permit the construction, as it (and the FAA before it) had invariably done in the past, and not from willful disregard of MWAA concerns. When the unpermitted construction was brought to GTE's attention, it was immediately stopped. When MWAA demanded that GTE's 200-circuit cable be replaced with a

Footnote continued on next page

in no way suggested how designation of its preferred demarcation point in any way advances security or safety, particularly with regard to that significant portion of GTE's network which is located in commercial areas which are on MWAA property but outside the IAD controlled security perimeter and completely open to public access.

In any event, MWAA's proposed demarcation point is not consistent with the Commission's regulations, much less GTE practice. First, the demarcation point which MWAA purports to establish "effective immediately" (see Volner Letter at 1) does not presently exist as a matter of physical fact. The effect of MWAA's determination, if it were valid, would be immediately to jeopardize all local telephone service in the Dulles exchange. In adopting Part 68, the Commission clearly intended that there be a specifically defined point which allocates maintenance (and financial) responsibility between the customer and the telephone company. MWAA attempts to establish an imaginary demarcation point on an imaginary termination frame that MWAA will install at some indefinite point in the future. Accepting that proposal would be irresponsible and courting disaster, particularly given the security and public safety concerns which MWAA

Footnote continued from previous page

100-circuit cable, GTE complied.

The Commission should take note that MWAA's reliance on purported unique public safety and security needs appears to be only a smokescreen. Although MWAA clearly has wide discretion to control activity at IAD to fulfill its legitimate public safety and security requirements, it cannot abuse that discretion purely to maximize its own economic gain. It strains credulity to conclude that the presence of a telephone cable in an underground conduit specifically designed to accommodate utility services could possibly compromise MWAA's legitimate public safety and security requirements, particularly as in this case the conduit is located outside the IAD controlled security perimeter. The Commission should require MWAA to establish some minimum factual prima facie case that its purported public safety or security concerns are legitimate.

invokes as its underlying rationale. Second, MWAA's proposed demarcation point does not conform with the Commission's definition of "minimum point of entry," in that it is neither at the point where the wiring crosses the property line nor at the point of entry into multiunit premises buildings.

Finally, MWAA's policy argument about carriers not invoking "claims of ownership" to frustrate the Commission's inside wiring policies is without merit. The Commission's inside wiring policy was never intended to permit, nor does it now permit, a customer to convert a LEC's entire local exchange network into inside wiring.

III. DETERMINATION OF THE STATUS OF MWAA'S PROPOSED DULLES TELECOMMUNICATIONS SYSTEM IS WITHIN THE EXCLUSIVE JURISDICTION OF THE VIRGINIA STATE CORPORATION COMMISSION.

The real issue presented by the MWAA Request is whether MWAA's proposed telecommunications network at Dulles is properly classified as a shared tenant system ("STS") or whether it should instead be regarded as a facilities-based competitive access provider ("CAP") under Virginia law.[12] A closely related issue is whether, under Virginia law, MWAA may

[12] 1995 VA. ACTS ch. 22, 35, and 187 added VA. CODE ANN. § 56-265.4:4.C (1995 Repl. Vol.), which permits the VSCC to certificate competitive local exchange telephone companies to operate within the franchise territory of a currently certificated incumbent local exchange carrier. The statute does not clearly define a term unequivocally referring to each type of carrier. In order to precisely refer to each type of carrier, the term "local exchange carrier" or "LEC" refers to an incumbent, certificated company with a duty to serve as the carrier of last resort (such as GTE); the term "competitive access provider" or "CAP" refers to a local exchange telephone company, not the carrier of last resort (such as MWAA), authorized by the VSCC pursuant to section 56-265.4:4.C to provide local exchange telephone service within the certificated territory of an incumbent LEC. This usage conforms to the general use of these terms by the communications bar and avoids the confusion which would result by referring to both as local exchange telephone companies qualified by descriptive adjectives.

unilaterally oust GTE as the certificated LEC for the Dulles exchange. Resolution of both of these issues falls squarely within the exclusive jurisdiction of the VSCC. For that reason, the Commission should, at a minimum, defer action on the MWAA Request until the VSCC has had an opportunity to consider those important questions of state law. Although MWAA as of the date of this filing has not yet bothered to apply for STS status, these questions are now pending before the VSCC as a result of GTE's Petition For Declaratory Judgment and Injunctive Relief (Case No. [not yet assigned] Sept. 7, 1995) (provided at Exhibit E).

Under Virginia law, GTE has a duty to serve any customer within its certificated territory desiring such service and is subject to penalties if it fails to render such service. See VA. CODE ANN. § 56-469 (Michie 1995 Repl. Vol.). In order to fulfill this duty, GTE must be able to serve those customers using and controlling its own equipment. Without seeking a Certificate of Public Convenience and Necessity from the VSCC, and without demonstrating, as presently required under Virginia law,[13/] that GTE has failed to provide adequate service, MWAA seeks effectively to oust GTE as the LEC for the entire Dulles exchange. MWAA would, instead, substitute itself as a wholly-unregulated bottleneck monopolist with the practical ability to impose its service on 4,000 plus captive customers in the Dulles exchange. MWAA seeks this Commission's acquiescence and participation in its plan by seeking a declaratory ruling to establish a single demarcation point for the entire 17-square-mile Dulles complex.

[13/] See VA. CODE ANN. § 56-265.4:4 (Michie 1995 Repl. Vol.) (forbidding VSCC to grant another utility a Certificate of Public Convenience and Necessity unless "the service rendered by the [existing] certificate holder . . . is inadequate . . . .")

Whether MWAA will be an STS provider or a CAP is committed to the jurisdiction of the VSCC by statute and FCC precedent. Under the Communications Act of 1934, as amended, with exceptions not here relevant, the FCC does not have jurisdiction over intrastate communications service. 47 U.S.C. § 2(b)(1) (1988). Moreover, the FCC specifically elected not to preempt state regulation of STS after carefully considering whether it should do so. See Policies Governing the Provision of Shared Telecommunications Service, 3 F.C.C. Rcd. 6931 (1988).

The VSCC has adopted rules to govern STS within the Commonwealth, see Investigation of Private Resale or Shared Use of Local Exchange Services, Final Order, 3:3 VA. REGS. REG. 328 (Nov. 10, 1986) (the "STS Rules") (provided at Exhibit F). The VSCC is now reevaluating those rules in conjunction with its consideration of rules to regulate CAPs. See Investigating Local Exchange Telephone Competition, Including Adopting Rules Pursuant to Va. Code § 265.4:4.C.3, 11:21 VA. REGS. REG. 3547, 3551 (July 10, 1995) (provided at Exhibit G).

The current Virginia STS rules permit a limited resale offering to business customers within a building or to a small group of interconnected buildings.[14/] It was never intended to apply to a large geographic area consisting of numerous and diverse telecommunications customers such as those existing at the Dulles exchange. Dulles is a medium-sized exchange[15/] comprising

---

14/ The STS rule provides in part that STS may be provided to customers that are "within specifically identified buildings or facilities that are within specifically identified contiguous property areas and are . . . within a common development. . . ." STS Rules § 1(b).

15/ GTE's central office provides 350 access lines for MWAA, 3,800 access lines serving commercial facilities located on MWAA-leased property but outside the airport proper, and 250 access lines to residential and commercial customers located beyond MWAA-leased property. The Dulles exchange has more access lines than 50% of Virginia LECs (including rural telephone companies) have in all their local exchange networks combined.

17 square miles and numerous buildings and other structures. While Dulles does contain an airport,[16/] which qualifies under existing VSCC rules for STS by itself, see STS Rules § 1, the fact that an airport is located in the Dulles exchange does not mean that STS can extend beyond the airport terminals and associated buildings. The VSCC's STS rules specifically state that STS "shall not be offered to the general public . . . ." STS Rules § 5. However, this is exactly what MWAA proposes to do, as MWAA's service will be offered to anyone who is located at the Dulles exchange. In short, MWAA intends to operate as a local exchange carrier and freeze GTE out of its certificated territory. The STS Rules certainly do not countenance MWAA's intended actions.

In its comments submitted in the current VSCC rulemaking, MWAA has evidenced a deep concern that it might be classified as a CAP rather than an STS provider. See Comments of Metropolitan Washington Airports Authority at 9-13 (Case No. PUC950018 Aug. 4, 1995) ("MWAA Comments") (provided at Exhibit H).[17/] This position is particularly puzzling because the status of MWAA's proposed network as an STS or a CAP is irrelevant to the accomplishment of the telecommunications goals which MWAA professes to pursue.[18/] The only plausible

---

[16/] Dulles is much more than just an "airport." It includes hotels, car rental companies, office buildings, toll booths, and much more.

[17/] MWAA opposes adoption of a rule by the Virginia Commission which would require STS providers to be regulated, in favor of a case-by-case adjudicatory approach. MWAA Comments at 9. The remainder of its comments outline proposed adjudicative standards which are carefully defined to ensure that MWAA would not fall within their scope.

[18/] See MWAA Request at 3. In addition, MWAA mischaracterizes GTE's local exchange network as "old, outmoded, and inadequate copper wire[.]" See id. GTE has continually up-

Footnote continued on next page

reason that MWAA would fear designation as a CAP is that it would then have to compete on a level playing field with GTE's existing local exchange network. Moreover, the existence of GTE at Dulles, capable of offering circuits in bulk to a reseller CAP, would require MWAA to offer its own circuits for resale at a reasonable price. All of the lofty telecommunications objectives which MWAA professes as the underlying basis for its intentions would be realized without regard to whether its system is classified as an STS or CAP under Virginia law. The only impact that a CAP classification would have is that MWAA could not establish itself as an unregulated telecommunications bottleneck. As a CAP, it would not be able to eliminate its financial risk by forcing its services upon 4,000 captive customers.

IV. MWAA'S PROPOSED ACTION SERVES ONLY ITS OWN ECONOMIC INTERESTS AND IS DETRIMENTAL TO "BROADER PUBLIC INTERESTS".

MWAA represents that the broader public interest would be served by a Commission order relocating GTE's demarcation points to Building 8. MWAA asserts that this move would be procompetitive and would best serve security and public safety needs. It is dead wrong on the first assertion, and its second assertion depends upon the truth of conjectural assumptions.

A. MWAA's Proposed STS Service Will Stifle Competition.

MWAA plans to establish a telecommunications network at Dulles which parallels GTE's local exchange network. It is abundantly clear that MWAA's real objective is to minimize the financial risk attendant upon its plan by eliminating GTE as a competitor and installing itself as an

---

Footnote continued from previous page

graded its Dulles local exchange network to meet advancing telecommunications needs. Many of GTE's customers are presently served by a fiber optic network which is fully capable of supporting advanced telecommunications needs.

unregulated telecommunications bottleneck through which all telephone service must pass (and to which all users must pay). To be sure, MWAA assures the Commission that it will interpose no legal objection to any of its tenants obtaining service directly from GTE (the LEC of last resort) if desired. MWAA Request at 4. However, MWAA seeks to impose substantial financial and practical burdens so onerous that no rational businessperson could seek service from GTE.

First, MWAA seeks virtually to ensure that existing GTE customers who elect to retain service from GTE will ultimately have unsatisfactory and unreliable service. MWAA admits that "GTE will, as a matter of law, continue to own cabling both on its side and the Airport side of the demarcation point for so long as that plant remains in operation . . . ." Volner Letter at 1. In the same breath, however, MWAA denies to GTE every incident of ownership of its existing local exchange network except the right to send electrons through existing lines: "The Authority will make any modifications, repairs or replacements to GTE's wiring on the Airport side of [MWAA's proposed] demarcation point." Id. MWAA makes no commitment (and has no regulatory duty) to make any repairs at all to GTE's facilities, to make them in a timely manner, or to make them in a manner which complies with appropriate technical standards required to ensure network reliability. Reliable communications capability is the lifeblood of business. MWAA must be well aware that it will be able to put GTE's Dulles exchange out of business in short order if it can ensure that GTE's customers receive unreliable, unresponsive service. It can well be concluded that MWAA's intent is to do just that.

Moreover, MWAA seeks to ensure that any existing customer which elects to retain service directly from GTE will face an unacceptable financial burden. It purports to preempt

Virginia state law by prescribing that all modifications, repairs, or replacements to GTE facilities shall be on an "unregulated basis." Id. MWAA unilaterally purports to abrogate existing contracts between GTE and its customers and to dictate the terms of GTE's relationship with its customers by decreeing that any repairs or modifications to GTE's local exchange network "shall be at the expense of the party requesting or necessitating such repair or replacement." Id. MWAA seeks to prevent GTE (or any facilities-based CAP) from competing with it on a level playing field--customers of GTE and/or other facilities-based CAPs must bear the entire cost of outside network repairs immediately. Again, no reasonable inference can arise but that MWAA seeks to put GTE's Dulles exchange out of business.

Finally, MWAA's actions are calculated to ensure that no new customer exercising reasonable business judgment would elect to receive service directly from GTE or a competitive access provider. MWAA states that "[u]nder no circumstances will GTE or its agents be permitted to install new facilities . . . without prior, written approval from the appropriate officials of the Authority." Id. (emphasis added). Establishing a cumbersome procedure by which GTE must ascertain the customers needs, negotiate with the Authority to be permitted to construct or rearrange facilities required to serve those customers, and then waiting for written authorization before undertaking that service[19/] will undoubtedly make GTE's service offerings unattractive to

[19/] As discussed supra n.5, MWAA has already embarked on a course of conduct to delay issuance of construction permits to GTE, with recently-submitted permit applications taking about six weeks to resolve. Moreover, MWAA has tried to control GTE's network design. See supra n. 5 (MWAA limited GTE to constructing 100 circuits rather than the 200 indicated by standard network design considerations). No prospective customer would be willing to wait six weeks for telephone installation, with no assurance that its order would be fulfilled as submitted, if it could turn to an alternative provider and receive service in a matter of days.

potential new customers. This is particularly the case if the alternative is arranging turn-key telecommunications service through MWAA's parallel network. Moreover, MWAA would require the potential customer to pay the entire installation cost (in some instances, more than $60,000 per mile), plus, presumably, a charge for lease of conduit space within which these special lines would be placed. MWAA is currently demanding that GTE pay conduit royalties of $26,500 per mile ($5 per foot);[20/] presumably, it would expect something comparable from customers desiring to bypass MWAA's network in favor of direct access to GTE as the carrier of last resort.

B. MWAA's Reliance on Security and Public Safety Arguments Is Without Merit.

MWAA argues that security and public safety concerns require it to prevent GTE from servicing its local exchange network at Dulles. GTE fully understands and supports the legitimate security and public safety concerns which MWAA is charged with protecting. However, MWAA cannot use these concerns as a sword to eviscerate GTE's legitimate rights to serve its customers in the Dulles exchange, at least in the absence of facts indicating that GTE has breached MWAA's valid requirements. MWAA cannot carry this burden by making vague representations that too many telephone trucks are around the airport. It has not provided a single fact indicating that GTE or its predecessors in the 30 plus years they have served Dulles ever

[20/] This demand, in itself, is evidence of MWAA's intention to freeze GTE out of its Dulles exchange. It is orders of magnitude above the fee (a few cents per mile) currently charged by MWAA and, previously, by the FAA. The entire historical royalty payment crept up from about $5,000 per year in the early 1970's to about $10,000 per year in 1994. If MWAA is successful in raising the royalty fee to $5.00 per foot, GTE's annual royalty payment will jump to $1,056,000 for its approximately 40 miles of cable.

breached Dulles security and public safety interests.[21] Moreover, the Commission should note that most of the commercial establishments from which MWAA proposes to exclude GTE are located outside the airport security zone; access to these areas by the public is totally uncontrolled. MWAA should be required to demonstrate how the legitimate operations of a certificated LEC which is fully prepared to comply with reasonable requirements will adversely impact the Airport authority's legitimate security and public safety concerns.

The Commission should dismiss out of hand MWAA's conjecture that Bell Atlantic or other, unnamed entities, will disrupt airport operations and degrade security and public safety. First, it is unlikely that a third carrier would undertake to construct a network which parallels two existing networks to serve a limited market,[22] particularly considering that it can play the two facilities-based carriers against each other in negotiating resale arrangements. In any event, more than conjecture ought to be required to disrupt established property interests supported by legitimate investment-backed expectations.[23] The issue here is the present exclusion of a certificated LEC with a property right under Virginia law to be at Dulles. That is entirely different from any issue arising from exclusion of possible future facilities-based CAPs. Finally, even if a facilities-

---

21/ For explanation of the Greenway construction incident, see supra nn.4 and 11 and accompanying text. In particular, MWAA should be required to provide some minimum factual predicate for its assertion that the presence of GTE's cable in an underground conduit installed specifically to accommodate utility services can possibly compromise public safety or security.

22/ See supra n.15 (comparing size of Dulles exchange to other Virginia exchanges)

23/ Not only does GTE have millions of dollars of plant in place at Dulles, but, under Virginia law, the right to serve the public under a Certificate of Public Necessity and Convenience is a property right entitled to protection by the courts. Town of Culpepper v. Virginia Electric and Power Co., 207 S.E.2d 864, 867-68 (Va. 1974). See Part V infra.

based CAP does seek to build a third parallel network, MWAA has not demonstrated how such an activity would offset its legitimate security and public safety concerns, particularly in those portions of the Dulles community which are outside the airport security perimeter.

V. BELL ATLANTIC TELEPHONE COMPANIES V. FCC LIMITS THE COMMISSION'S DISCRETION TO GRANT MWAA'S REQUEST

GTE's Certificate of Public Convenience and Necessity ("Certificate") is a property right under Virginia law. The Commission action sought by MWAA would, as described above, effectively destroy that right with respect to the Dulles exchange. This being the case, the Commission lacks authority to grant MWAA the action it seeks.

In Town of Culpeper v. Virginia Electric and Power Company, 207 S.E.2d 864 (Va. 1974), Virginia Electric and Power Company ("VEPCO") and Northern Piedmont Electric Cooperative, Inc. furnished electric power to 1,300 homes and businesses in an unincorporated 4,313-acre area of Culpeper County under certificates of public convenience and necessity. On December 31, 1967, this area was annexed by the Town of Culpeper, which sought to oust VEPCO as the electric service utility in favor of its own municipal electric system. Id. at 865. The Virginia Supreme Court refused to permit the Town to do so, holding that a certificate of public convenience and necessity in Virginia is a property right entitled to protection by the courts. Id. (citing Capital Elec. Power Ass'n v. Mississippi Power & Light Co., 150 So. 2d 534, 540 (Miss.), appeal dismissed, 375 U.S. 77 (1963)). That ruling is directly applicable to GTE's right to serve the Dulles exchange.

Like Culpepper, MWAA assumed jurisdiction over Dulles airport long after GTE was established as the LEC for the airport and surrounding area Like Culpepper, MWAA cannot interfere with GTE's rights under its Certificate.

In these circumstances, this Commission must consider the limits on its authority established in Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). There, the D.C. Circuit held that the Commission is without takings power in the absence of clear statutory authority or implied authority necessitated by a defeat of its power to regulate telecommunications unless such a takings power were implied. Id. at 1446-47. Grant of the MWAA Request will necessarily involve a regulatory taking of GTE's Certificate rights protected by Virginia law. Under Bell Atlantic, the Commission is without power to order such a taking. It has no clear statutory authority to do so nor is there any defeat of its regulatory authority which would imply such power. Therefore, the Commission must deny the MWAA Request.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny the Request for Declaratory Ruling filed on August 14, 1995, by the Washington Metropolitan Airports Authority.

Respectfully submitted,

GTE SOUTH INCORPORATED

By: ______________________________
George A. Avery, Esq.
Michael A. Carvin, Esq.
Norman J. Fry, Esq.

Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8856

David J. Gudino, Esq.
GTE Service Corporation
1850 M Street, N.W. Suite 1200
Washington, D.C. 20036-5801
(202) 463-5212

A. Randall Vogelzang, Esq.
GTE South Incorporated
4100 N. Roxboro Road
Durham, N.C. 27704
(919) 317-5344

Its Attorneys

September 8, 1995

Exhibit B